restriction by the Bar Council, the defendant, to the mode and manner of his performance of his duties within the meaning of Legal Profession (Practice and Etiquette) Rules 1978 and without the risk of any penalty under the law. I substitute this wording to avoid any ambiguity and to reflect the considered judgment of the Court to do justice to the plaintiff and her counsel R.R. Sethu as well as to the defendant.

I must emphasise that in my decision I am only concerned with the legal propriety of any order/direction given by defendant restraining or restricting the audience of Sethu on behalf of plaintiff in the relevant Supreme Court Appeal. No other issue was substantially canvassed before this Court by any party. As each case is decided on its own facts, this decision should not therefore be construed as fettering the statutory discretionary powers of the defendant who is doing a difficult job in very trying circumstances. Although I find against them on the particular facts, I do not attribute any wilful *mala fide* on their part and accordingly I order each party to bear its own costs.

Before I conclude I must thank counsel for both parties for arguing painstakingly this novel point of interpretation.

SALCON ENGINEERING SDN. BHD.

v.

PRM ENERGY SYSTEMS (M) SDN. BHD.

HIGH COURT, KUALA LUMPUR
DATO' ANUAR BIN DATO' ZAINAL ABIDIN J.
[CIVIL SUIT NO. S1-22-182-1993]
27 MAY 1993

INJUNCTION: Effect of non-disclosure of material facts on injunction granted ex-parte - Whether injunction should be discharged forthwith - Whether court should consider merits of case despite non-disclosure - Both parties represented by counsel at inter-partes hearing - Whether issue of non-disclosure relevant.

The plaintiff applied for and obtained *ex-parte* a Mareva injunction against the defendant. At the *inter-partes* hearing to discharge or continue the injunction, the defendant alleged that there was non-disclosure of material facts by the plaintiff at the *ex-parte* application and contended that if the plaintiff was infact guilty of such non-disclosure, the court should forthwith discharge the injunction without inquiring further into the merits of the case. Several recent decisions of the English Courts were cited by the defendant in support of the contention.

The Court nevertheless refused to follow the English decisions on the grounds that the approach adopted therein was impractical of application and secondly that those cases were based on policy grounds to prevent what must be an abuse in the English system.

The issues that arose were:

(1) Whether the plaintiff was infact guilty of non-disclosure; and
(2) Whether upon proof of non-disclosure of material facts, the Court ought to discharge forthwith an injunction granted *ex-parte* or whether, before discharging or continuing such injunction, the Court ought to look into the totality of the evidence before it be there non-disclosure of material facts or not.

Held:

[1] It is impractical to require that virtually every document and every issue between the parties be disclosed at the *ex-parte* stage. This requirement will result in the Court being encumbered with a forensic study on the question

of disclosure and at the end of the exercise much time is wasted. It is more pragmatic to approach the *inter-partes* hearing by considering the merits of continuing the injunction on the material disclosed by the parties. This is a more sensible approach since the task of the Court at the *inter-partes* hearing is to consider on the basis of all the evidence before it, whether the injunction should be continued or not.

[2] In dealing with situations such as the present case, non-disclosure should only go towards the award of costs besides rendering the plaintiff liable on its undertaking as to damages. Where the non-disclosure is so serious as to amount to a positive misleading of the Court, then it becomes a matter which goes to the balance when considering the probity and bona fides of the applicant and not as an absolute bar to the application. In such circumstances, the Court will look at the applicant with a high degree of circumspection.

[3] In any event, on the facts of this case the plaintiff was not guilty of any material non-disclosure when applying *ex-parte* and as all the necessary *criteria* for the grant of the injunction *inter-partes* exist, the plaintiff's application is therefore granted.

[Application for continuation of injunction granted].

Cases referred to:

Behbehani & Ors. v. Salem & Ors. [1989] 2 All ER 143 ***(refd)***

Ali & Fahd Shobokshi Group Ltd. v. Moneim [1989] 2 All ER 404 ***(refd)***

Brink's Mat Ltd. v. Elcombe & Ors. [1988] 3 All ER 188 ***(refd)***

Bennett v. The Excelsior Land, Investment and Building Company Limited and Bank [1893] 14 LR (NSW) (Eq) 179 ***(refd)***

Broadbent & Ors. v. Marshall & Ors. [1863] 2 VLR 115 ***(refd)***

Professor Dr. A. Kahar Bador & Ors. v. N. Krishnan & Ors. [1983] 1 MLJ 407 ***(refd)***

For the plaintiff - Sri Ram (Albert Toong & David Morais with him); M/s. Albert Toong & Assoc.

For the defendant - S.C. Loh (P. Gananathan with him); M/s. Cheang & Ariff

JUDGMENT

Anuar bin Dato' Zainal Abidin J:

The plaintiff, by a summons-in-chambers dated 24 March 1993, applied for and obtained *ex-parte*, an injunction in the form of a "Mareva" injunction against the defendant also on 24 March 1993. I made the summons returnable on 8 April 1993. The papers were duly served on the defendant, respective affidavits were filed and argument was heard in chambers over a number of days. After each hearing, the injunction was continued till the next hearing date and finally till the date of judgment.

The main argument advanced by the defendant was that the plaintiff was guilty of non-disclosure of material facts. It was urged on me that if the plaintiff was indeed guilty of wilful non-disclosure, then I ought to refuse to continue the injunction, without inquiring into other aspects of the case.

Much of the defendant's argument was based on recent development in the law in England and in particular, was concentrated on the cases of *Behbehani & Ors. v. Salem & Ors.* [1989] 2 All ER 143, *Ali & Fahd Shobokshi Group Ltd. v. Moneim* [1989] 2 All ER 404 and *Brink's Mat Ltd. v. Elcombe & Ors.* [1988] 3 All ER 188.

The position of the English Courts in these cases appear to place an extremely high burden of disclosure on the plaintiff applying for an injunction *ex-parte*. Their position seems to be that unless all material facts are disclosed, whether their materiality was known at the time of applying for the injunction or not, any injunction granted *ex-parte* would be discharged for want of disclosure.

Those cases also considered the question of re-grant of subsequent injunctions if on full disclosure at the *inter-partes* hearing, there was sufficient cause disclosed to warrant subsequent injunctions. According to those cases, fresh or second injunctions would only be considered after assessment of the degree and extent of culpability with regard to non-disclosure and the significance to the outcome of the *ex-parte* application of the matters which were not disclosed to the Court. It is only after the "culpability" and "significance" thresholds are crossed will the Court consider the merits of a fresh injunction.

The difficulty with the *Brink's Mat* line of cases is that they seem to require that virtually every document and every issue between the parties be disclosed at the *ex-parte* stage. This would be impractical both from the point of view of the applicant who obviously has to prepare his

application on an urgent basis and impractical for the Court which will have to spend considerable time going through all the documents in detail.

Further, those cases are based on policy grounds to prevent what must obviously be an abuse in the English system. The rationale being to penalise parties who fail in their duty to the Court. While I agree that such parties should be penalised, the penalty should be reflected on the question of probity and *bona fides* and not as an absolute bar as those cases seem to indicate.

I am more inclined to follow the rationale in the cases of *Bennett v. The Excelsior Land, Investment and Building Company Limited, and Bank* [1893] 14 LR (NSW) (Eq) 179 and *Broadbent & Ors. v. Marshall & Ors.* [1863] 2 VLR 115, in dealing with situations such as the present case, where a limited injunction is granted *ex-parte* until the hearing *inter-partes.* In *Bennett* and *Broadbent*, it was decided that the question of non-disclosure was not relevant to the *inter-partes* hearing where both sides were obviously represented. If there was non-disclosure, this would go towards the award of costs. I would go further and say that material non-disclosure at the *ex-parte* stage might additionally render the plaintiff liable on its undertaking as to damages.

This is a more sensible approach since the task of the Court at the *inter-partes* hearing is to consider on the basis of all the evidence before it, whether the injunction should be continued or not. I do not agree with the *Bennett* and *Broadbent* approach in so far as serious non-disclosure is concerned. In my judgment, where the non-disclosure is very serious so as to amount to a positive misleading of the Court, then it becomes a matter which goes into the balance when considering the probity and *bona fides* of the applicant. In such circumstances, the Court will look at the applicant with a high degree of circumspection.

The practicality of the *Bennett* and *Broadbent* approach is that the Court will not, at the *inter-partes* hearing, be encumbered with a forensic study on the question of disclosure. In some cases, such as the present, this is an onerous task involving detailed study of a voluminous documents. At the end of this exercise, much time is wasted. I prefer to approach the *inter-partes* hearing on a more pragmatic level by considering the merits of continuing the injunction on the material disclosed by both parties.

I have dealt with these issues at some length in deference to the argument urged on me by both parties. If, however, I am wrong on the law, it is my judgment that on the facts of this case, the plaintiff was not in any event, guilty of material non-disclosure when applying *ex-parte.*

I am mindful of the decision of Hashim Yeop A. Sani J. (as he then was) in *Professor Dr. A. Kahar Bador & Ors. v. N. Krishnan & Ors.* [1983] 1 MLJ 407 as to what amounts to a suppression of material facts.

The main issue of non-disclosure put forward by the defendant is that the plaintiff has failed to disclose the "conditions of contract". The defendant says that if those conditions had been disclosed, the Court would have come to the view that the imposition of liquidated and ascertained damages (LAD) by the defendant on the plaintiff, was contractually provided for.

I find that on re-reading the plaintiff's 1st affidavit (which was the affidavit on which I granted the *ex-parte* injunction), that the issue of LAD has indeed been disclosed sufficiently. The plaintiff has disclosed that an issue exists as to the imposition of LAD and has sufficiently disclosed the existence of the dispute on this issue. Notwithstanding that the actual conditions of contract were not exhibited, the explanation as to the dispute is in my view sufficient disclosure. Indeed, on hearing both parties, it is clear that whether or not LAD was contractually provided for in the agreement between the parties is a matter which cannot be determined on affidavit evidence alone. It is in fact a serious question to be tried and I do not propose, nor am I required to, resolve that issue on affidavits alone at this stage.

The other issues raised on the question of non-disclosure, such as the variation works, consultants' fees, whether certain invoices were due or not, progress claims and warranty are, in my judgment, matters which are not sufficiently material and in any event, are all matters which are in dispute. As with the issue of LAD, these too are matters which are issues which can only be determined at trial. The issue, therefore, of whether the monies/damages claimed by the plaintiff are in fact owed is, in my judgment, a serious issue to be tried.

Coming to the issue of the risk of dissipation of assets, I am far from satisfied with the explanations given by the defendant. Stripping the matter to its core, we are left with a situation where the defendant has no proven prior trading record in Malaysia nor has it shown with any degree of conviction that it has secured any future business. It owns no assets within the jurisdiction and does not even have proper business premises. Further, it has been demonstrated that the plaintiff is really the alter ego of a family business run by the Bailey family. That family is resident ordinarily in the United States. The only assets within the jurisdiction are liquid assets in their bank accounts which can readily be uplifted. The plaintiff's fear of the assets being dissipated are, in my judgment, real. The balance of convenience must be in favour of the plaintiff.

In the circumstances, and in the exercise of my discretion, I am satisfied that all the necessary criteria for the grant of the injunction *inter-partes* exist. I therefore grant an order in terms of Encl. (3) until the trial of this action. Bearing in mind that such an injunction may cause some hardship to the defendant, I hereby also order an early trial of this action. As soon as Counsels have settled the directions and set this matter down for trial, they may seek an appointment with me to fix trial dates.

The costs of this application shall be paid by the defendant to the plaintiff in any event.

SHARIFAH MASTURA BTE TUANKU IBRAHIM

v.

WAN AZIZ IBRAHIM

HIGH COURT, KUCHING
DATO' HJ. ABDUL KADIR BIN SULAIMAN J.
[ORIGINATING MOTION NO. KG. 17 OF 1992]
26 JULY 1993

LAND LAW: Caveat - Definition of "caveatable interest" - Sarawak Land Code (Cap. 81) s. 173(a) - National Land Code, 1965 s. 323 - Land caveated by registered proprietor - Whether registered proprietor had locus standi - Whether proprietry right per se gave rise to caveatable interest in land.

The applicant in this case had caveated her own land in a purported attempt to protect her proprietry interest therein after the said land had been caveated upon by the respondent. The respondent had caveated the land on the strength of two deeds allegedly executed by the applicant in his favour, namely a Power of Attorney to deal with the land and a Trust Deed. The respondent subsequently applied to the Registrar of Land and Survey Department, Kucing, for the registration of a Memorandum of Transfer to transfer the said land to his name and in consequence of that application, a notice under section 178, Sarawak Land Code (cap. 81) to remove the applicant's caveat was served on the applicant by the Assistant Registrar.

The applicant applied for an order that her caveat against the land in dispute should not lapse and should remain in force until further order of the Court. The question before the Court was whether a registered proprietor in the capacity of the applicant could make use of the provisions in s. 173 of the Sarawak Land Code to lodge a private caveat over her properties.

Held:

[1] A registered proprietor of land is not entitled to enter a private caveat in respect of his own land unless he can show some circumstances which affirmatively give rise to a distinct interest in the land other than the fact that he is the registered proprietor of the property.

[2] In the instant case the applicant has not established any circumstance over and above